FEB 28 1973

IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

72-1186

TOP VISION CABLE CO. OF KY. - - Petitioner

versus

CITY OF OWENSBORO, KENTUCKY, a Municipal Corporation of the Second Class, and IRVIN TERRILL, Mayor, WAITMAN C. TAYLOR, Commissioner, JOHN D. MILLER, Commissioner, JOHN O. FISHER, Commissioner, ALTON PUCKETT, Commissioner - Respondents

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PETITION FOR CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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TOP VISION CABLE CO. OF KY. - - *Petitioner*

v.

CITY OF OWENSBORO, KENTUCKY, a Municipal Corporation of the Second Class, and IRVIN TERRILL, Mayor, WAITMAN C. TAYLOR, Commissioner, JOHN D. MILLER, Commissioner, JOHN C. FISHER, Commissioner, ALTON PUCKETT, Commissioner - *Respondents*

PETITION FOR CERTIORARI TO THE KENTUCKY COURT OF APPEALS

The Petitioner, Top Vision Cable Co. of Ky., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Kentucky Court of Appeals entered in this proceeding on September 22, 1972.

OPINION BELOW

The opinion of the Kentucky Court of Appeals is reported at 487 Southwestern Second 283.

JURISDICTION

The date of the entry of the judgment sought to be reviewed is September 22, 1972. A timely petition for rehearing was denied on December 15, 1972, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. Whether the Federal Communications Commission, by the enactment of regulations dealing with local franchise requirements for a Cable Television Franchise, has preempted this area of the law so that the severability of a franchise fee provision from the remainder of a franchise agreement must be determined as a matter of federal law and policy rather than state law?

II. Whether the Judgment of the Kentucky Court of Appeals results in a deprivation of Petitioner's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional provision here involved is Section 1 of the Fourteenth Amendment to the Constitution of the United States, which is set out verbatim as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutory provision here involved in 47 U.S.C. §151, which is set out verbatim as follows:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

STATEMENT OF THE CASE

The Petitioner is a corporation organized and existing under the laws of the Commonwealth of Kentucky. Since December, 1965, Petitioner has owned a franchise issued by the City of Owensboro, Kentucky, (hereinafter sometimes referred to as the "City"), which franchise entitled it to operate a cable television system within the city limits of Owensboro. Prior to the time this lawsuit was commenced, Petitioner had spent in excess of $430,000.00 in construction of such a system. Under the terms of the franchise, Petitioner was obligated to pay the City a franchise fee equal to 26% of the gross income received by Petitioner from its operation of the cable system.

On March 26, 1972, in the consolidated cases of *Wonderland Ventures, Inc.* v. *City of Sandusky, Wonderland Ventures, Inc.* v. *City of Fremont,* 423 F. 2d 548 (6th Cir., 1970), the Court of Appeals for the Sixth Circuit held that municipal ordinances which impose a gross receipts tax on cable television systems are unconstitutional because such a tax constitutes a burden upon proceeds from interstate commerce in violation of the Commerce Clause of the Constitution of the United States.

After the decision in *Wonderland Ventures, Inc.* v. *City of Sandusky, supra,* Petitioner instituted a declaratory judgment action in the United States District Court for the Western District of Kentucky, asking for a declaration that the gross receipts fee provision relative to its franchise be adjudged unconstitutional

pursuant to the rule announced by the federal circuit court in *Wonderland, supra.* Shortly thereafter, the Defendants, the Respondents herein, moved to dismiss that action due to the Court's lack of jurisdiction, basing their motion on a resolution passed after institution of the suit at a Board of Commissioner's meeting for the City of Owensboro. That resolution officially conceded the constitutional invalidity of the 26% gross receipts provision. The district court then dismissed the case for lack of jurisdiction since the sole federal issue involved there was the constitutionality of the gross receipts fee provision.

After the City's concession of the invalidity of the 26% gross receipts fee provision, the Petitioner attempted to renegotiate a franchise fee to be paid to the City for the rights granted by the franchise, but the City refused all attempts to enter into such negotiations. The City took the position that, nothwithstanding a clear-cut severability clause in the franchise agreement, the invalidity of the fee provision invalidated the entire Franchise Agreement (Appendix, pp. 27-34), and therefore the Petitioner no longer had a franchise to exercise. The present action was originally filed in the Daviess Circuit Court by the Petitioner on December 19, 1970, with the Petitioner asking that the court rule, in part, that the invalidity of the franchise fee provision did not invalidate the entire Franchise Agreement, and thereby deprive it of its franchise. In addition, the Petitioner asked the Court to direct the City to renegotiate the franchise fee provision so that Petitioner could move forward and exercise its franchise.

On April 6, 1971, the trial court, relying in part upon the clear-cut severability clause in the Franchise Agreement, ruled that the Franchise Agreement remained valid and enforceable despite the unconstitutional fee provision, and ordered the City to renegotiate that fee provision based upon the burdens imposed or likely to be imposed by the CATV system upon the public ways of the City (Appendix, p. 15). The Respondent appealed from the decision of the Daviess Circuit Court, and the Kentucky Court of Appeals, in a ruling issued on September 22, 1972, in which the severability clause is ignored, held that the entire Franchise Agreement was void due to the invalidity of the gross receipts fee provision (Appendix, pp. 16-26).

Prior to the date of the decision by the Kentucky Court of Appeals, but subsequent to the time the case had been submitted on briefs to that Court, the Federal Communications Commission issued detailed regulations pertaining to franchise fees paid by franchisees to a municipality for a cable television franchise. As of March 31, 1972, the FCC rule provided that

> The franchise fee must be reasonable (e.g., in the range of 3-5% of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments)). *P & F Radio Reg.* ¶85.31 (March 31, 1972).

In its Petition for Rehearing, filed with the Kentucky Court of Appeals on October 20, 1972, (Appendix, pp. 41-50) the Petitioner argued that by these rules

the Federal Communications Commission had preempted the area relating to franchise fees and CATV franchises, and that as a result the question of the validity or invalidity of the Franchise Agreement must be decided by looking to the federal law, federal regulations, and federal policy rather than state common law. In addition, Petitioner noted the Kentucky court's failure to face the issue of the severability clause and requested that the Kentucky court squarely pass on this issue.

On December 15, 1972, the Court of Appeals, without issuing an opinion, overruled the Petitioner's Petition for Rehearing.

ARGUMENT

I. The Federal Communications Commission, by the Enactment of Regulations Dealing With Local Franchise Requirements for a Cable Television Franchise, Has Preempted This Area of the Law so That the Severability of a Franchise Fee Provision From the Remainder of a Franchise Agreement Must Be Determined as a Matter of Federal Law and Policy Rather Than State Law.

It is accepted that the Federal Communications Commission (hereinafter referred to as "Commission") has the authority pursuant to the Communications Act of 1934, 47 U.S.C. §151, to fully and completely regulate cable television, *United States* v. *Southwestern Cable Co.*, 392 U. S. 157 (1968), and that such regulation is necessary and desirable considering the impact that cable television has had and will continue to have on the national communications network.

> CATV systems, formerly no more than local auxiliaries to broadcasting, promised for the future to provide a national communications system, in which signals from selected broadcasting centers would be transmitted to metropolitan areas through the country. *United States* v. *Southwestern Cable Co., supra.* at 164.

Since 1960, the Commission has responded to the increasing national importance of cable television by gradually asserting its jurisdiction over the operation of such systems. *Id.* at 165. In February, 1972, the Commission further extended its jurisdiction in this area by adopting extensive rules regarding the issuance of cable television franchises and the operation of these cable systems. *See* CABLE TELEVISION REPORT AND ORDER, 24 RR 2d 1506 (February 2, 1972). The rules became effective as of March 31, 1972.

In its REPORT, the Commission voiced increased concern over the large local franchise fees being paid by certain cable systems, and the burden such fees place upon the ability of a cable television system to provide efficient and inexpensive service to its customers, to the ultimate detriment of the national communications policy.

> The ultimate effect of any revenue raising fee is to levy an indirect and regressive tax on cable subscribers. Second, and of great importance to the Commission, high local franchise fees may burden cable television to the extent that it will be unable

> to carry out its part in our national communications policy. CABLE TELEVISION REPORT AND ORDER, *supra,* at 1578.

As the result of these concerns, the Commission ruled that the "maximum franchise fees should be between 3 and 5% of gross subscriber revenues." *CATV Rules,* 24 RR 1501, 1506 (1972).

In addition to enacting the rule regarding maximum franchise fees, the Commission also adopted other rules relating to the type and nature of a franchise to be granted a cable television system. For example, the Commission established time tables for the construction and operation of cable systems, *CATV Rules,* 24 RR at 1505, and ruled that reasonable limits must be placed on the duration of franchises, which in most cases are not to exceed fifteen years. *Id.* The Commission also established rules regarding the minimum channel capacity, *Id.,* access to channels, *Id.,* and many other matters related to requirements under local franchise agreements. It is interesting to note that the Commission expressly provided that there were certain issues related to cable television which were to remain within the jurisdiction of the state. Thus, the Commission ruled that "(d)elineation of franchise areas is a matter for local authorities to be exercised on a nondiscriminatory basis." *Id.* In the same manner, the Commission gave to local authorities the power to regulate subscriber rates. *Id.* In essence, it seems clear that by the adoption of this comprehensive scheme for the regulation of cable television the Commission has totally preempted the state of any authority to

dictate franchise provisions or standards, with the exception of those areas expressly left to the state or local body.

With the federal government, through the Commission, having occupied this area, questions relating to the continuing validity of a franchise and the severability of a franchise fee provision from the remainder of the Franchise Agreement in particular, must be governed by uniform federal rules rather than state common law or state statutes. *See, Western Union Telegraph Co.* v. *Speight,* 254 U. S. 17 (1920); *O'Brien* v. *Western Union Telegraph Co.,* 113 F. 2d 539, 541 (1st Cir., 1940); cf. *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448 (1957).

The Commission has attempted to provide for a uniform system of regulation and control of cable television for the benefit of the public. If the decision of the Kentucky Court of Appeals in the instant case is allowed to stand, it will mean that Kentucky courts have the authority to disregard federal policy and federal efforts to provide uniform standards for cable television and federal efforts to establish a national communications system. The Kentucky Court of Appeals did not consider the Commission's CATV Rules, effective prior to the date of its decision in the instant case, nor did it make any attempt to consider federal policy in its decision. That Court's judgment amounts to a decision that the attempt by the FCC to regulate cable television will result in the invalidation of every franchise agreement in Kentucky where the franchise provisions are not in conformity with the Commission's rules.

The FCC's purpose to be served by the enactment of these rules and regulations was to "open up Cable's potential to serve the public," *Proposals for Regulation of Cable Television Submitted to Congress by the Federal Communications Commission* (August 5, 1971), not to invalidate all franchises which do not conform to the rules. The FCC reemphasized this purpose in a Letter Ruling, dated August 22, 1972, entitled "Franchise Provisions at Variance with FCC Cable Television Rules" (Appendix, pp. 35-39) in which it stated

> that franchises (should) be drawn to include severability clauses that will enable the Commission to authorize system operations without the delay that might be created by the necessity for franchise amendment.

The Franchise Agreement in question here has such a severability clause, yet the Kentucky Court of Appeal's decision disregarded not only the clause, but the federal purpose to be served by such a clause.

In sum, what we have here is a train of events which, if undisturbed by this Court, could pose the invalidity of franchise agreements throughout the country. As set forth above, the national policy concerning franchise fees resulting from the adoption by the Commission of CATV Rules is that all franchise fees established by local grantors of CATV franchises should not exceed the range of 3% to 5% of gross receipts. The law as enunicated by the Court of Appeals for the Sixth Circuit in *Wonderland Ventures, Inc., supra,* is that a franchise fee provision based upon some substantial percentage of gross receipts is uncon-

stitutional as an improper burden upon interstate commerce. Clearly, neither the Court of Appeals for the Sixth Circuit nor the FCC intended that the invalidity of certain franchise fee provisions should result in the wholesale invalidation of cable television franchises. However, unless this Court sets aside the action of the Kentucky Court of Appeals here in affirming the action of the City of Owensboro, it will be open to every municipality and regulatory agency in the states and cities of the country to invalidate CATV franchises and to frustrate the national policy established by the FCC.

II. The Judgment of the Kentucky Court of Appeals Results in a Deprivation of Petitioner's Property Without Due Process of Law, in Violation of the Fourteenth Amendment to the Constitution of the United States.

A franchise issued for any purpose by the state or any subdivision within the state, has long been recognized as property which the franchisee cannot be deprived of except by due process of law. *See, e.g., Tennessee Electric Power Co.* v. *Tennessee Valley Authority,* 306 U. S. 118, 142 (1938); *Conway* v. *Taylor,* 66 U. S. 603, *Crittenden County* v. *McConnell,* 237 Ky. 806, 36 S. W. 2d 627 (1931). Any state action which results in the loss to the Petitioner of its franchise rights without a full consideration by a judicial body of each and every relevant fact must be considered state action which violates Petitioner's right to due process under the Fourteenth Amendment. The judgment of the Kentucky Court of Appeals, declaring the Petitioner's franchise to be void, was made without

any consideration of the intent of the parties, as expressed in the Agreement, or the stated national policy favoring the constant availability of cable television service to the public. As a result, the Court's action was arbitrary and capricious, resulting in a deprivation of Petitioner's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The Kentucky Court of Appeals absolutely refused to consider the fact that the Franchise Agreement contained a severability clause which expressly provided that should any provision of the Franchise Agreement be held invalid, "such invalidity shall not affect the validity of this grant as a whole, or any part thereof, other than the part declared invalid" (Appendix, p. 33). While the Court of Appeals recognized the existence of that provision, that Court completely failed to grant any weight to the expressed intention of the parties, as stated in the severability clause.

Furthermore, severability was not only the expressed intention of the parties, but it is also an essential part of the national policy concerning cable television franchises, as enunciated by the Commission. In a Letter Ruling, dated August 22, 1972, and entitled "Franchise Provisions At Variance with FCC Cable Television Rules" (see Appendix, p. 39), the Commission stated

> that franchises (should) be drawn to include severability clauses that will enable the Commission to authorize system operations without the delay that might be created by the necessity for franchise amendment.

This statement of policy by the Commission, brought to the Court of Appeals' attention in Petitioner's Petition for Rehearing, was intended to facilitate the continuation of cable television service in situations such as the one presented here. Yet that national policy, as well as the expenditure by Petitioner of an amount in excess of $430,000.00 to provide the residents of Owensboro with cable television service was totally ignored by the Kentucky Court of Appeals.

The Court of Appeals' refusal to consider the stated national policy concerning cable television franchise agreements and the expressed intention of the parties regarding the severability of provisions within the Franchise Agreement, was arbitrary and capricious, and its judgment amounts to a deprivation of Petitioner's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Kentucky Court of Appeals.

Respectfully submitted,

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